

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

ENRIQUE DIAZ,

Plaintiff,

v.

R. A. KESSLER, et al.,

Defendants.

No. C 14-02145 EJD (PR)

ORDER OF SERVICE; DIRECTING  
 DEFENDANTS TO FILE  
 DISPOSITIVE MOTION OR NOTICE  
 REGARDING SUCH MOTION;  
 INSTRUCTIONS TO CLERK

Plaintiff, a state prisoner at Salinas Valley State Prison (“SVSP”), filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983, against prison officials. Plaintiff’s motion for leave to proceed in forma pauperis will be granted in a separate order.

## DISCUSSION

### A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who

1 is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must,  
2 however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,  
3 699 (9th Cir. 1988).

4 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
5 elements: (1) that a right secured by the Constitution or laws of the United States was  
6 violated, and (2) that the alleged violation was committed by a person acting under the  
7 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

8 **B. Plaintiff's Claims**

9 Plaintiff claims that he was “subjected to discriminatory and retaliatory  
10 measurements” by prison officials at SVSP while Plaintiff was engaged in protected  
11 conduct. (Compl. at 3.) Specifically, Plaintiff claims that because he filed a  
12 “discrimination complaint” to the prison appeals office on April 21, 2013, Defendant D.  
13 Ambriz fabricated a false Rules Violation Report (“RVR”) on May 4, 2013. (Id.)  
14 Defendant R. Kessler found Plaintiff guilty of the RVR, and imposed penalties, and  
15 Defendants P. Sullivan and B. Hedrick approved the guilty finding. After Plaintiff  
16 appealed the matter, he appeared at a hearing before Defendant M. Ross, who denied  
17 him due process; Defendants J. J. Hughes and B. Hedrick approved the outcome. (Id. at  
18 5-A.) Plaintiff claims that subsequently, the RVR was “dismissed/invalidated.” (Id.)  
19 Plaintiff continued to pursue prison complaints against Defendants’ actions, and was  
20 pressured by Defendants L. M. Pennisi and P. Sullivan to withdraw them; Plaintiff filed  
21 another complaint regarding their interview. (Id.) Plaintiff claims that right after the  
22 “threats,” Defendants A. Tankersley and S. Nunez terminated his Jewish service on  
23 June 18, 2013. (Id. at 6-A.)

24 Liberally construed, Plaintiff states cognizable claims of a due process violation  
25 with respect to the allegedly false RVR, First Amendment retaliation, and First  
26 Amendment right to free exercise of religion.

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28 ///

**CONCLUSION**

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint, all attachments thereto, and a copy of this order upon **Defendants Lt. R. A. Kessler, Sgt. D. Ambriz, Lt. P. Sullivan, B. Hedrick, Lt. M. Ross, Capt. J. J. Hughes, Lt. L. M. Pennisi, Correctional Officer A. Tankersley, and Correctional Officer S. Nunez at Salinas Valley State Prison, (P.O. Box 1050, Soledad, CA 93960).** The Clerk shall also mail a copy of this Order to Plaintiff.
2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer before **sixty (60) days** from the day on which the request for waiver was sent. (This allows a longer time to respond than would be required if formal service of summons is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before Defendants have been personally served, the Answer shall be due **sixty (60) days** from the date on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.
3. No later than **ninety (90) days** from the date of this order, Defendants shall file a motion for summary judgment or other dispositive motion with respect to the

1 claims in the complaint found to be cognizable above.

2 a. Any motion for summary judgment shall be supported by adequate  
3 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules  
4 of Civil Procedure. Defendants are advised that summary judgment cannot be granted,  
5 nor qualified immunity found, if material facts are in dispute. If any Defendant is of the  
6 opinion that this case cannot be resolved by summary judgment, he shall so inform the  
7 Court prior to the date the summary judgment motion is due.

8 b. **In the event Defendants file a motion for summary judgment,**  
9 **the Ninth Circuit has held that Plaintiff must be concurrently provided the**  
10 **appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)**  
11 **(en banc). See Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

12 4. Plaintiff's opposition to the dispositive motion shall be filed with the  
13 Court and served on Defendants no later than **twenty-eight (28) days** from the date  
14 Defendants' motion is filed.

15 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure  
16 and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary  
17 judgment must come forward with evidence showing triable issues of material fact on  
18 every essential element of his claim). Plaintiff is cautioned that failure to file an  
19 opposition to Defendants' motion for summary judgment may be deemed to be a  
20 consent by Plaintiff to the granting of the motion, and granting of judgment against  
21 Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per  
22 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

23 5. Defendants shall file a reply brief no later than **fourteen (14) days** after  
24 Plaintiff's opposition is filed.

25 6. The motion shall be deemed submitted as of the date the reply brief is due.  
26 No hearing will be held on the motion unless the Court so orders at a later date.

27 7. All communications by the Plaintiff with the Court must be served on  
28 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true

1 copy of the document to Defendants or Defendants' counsel.

2 8. Discovery may be taken in accordance with the Federal Rules of Civil  
3 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or  
4 Local Rule 16-1 is required before the parties may conduct discovery.

5 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep  
6 the court informed of any change of address and must comply with the court's orders in  
7 a timely fashion. Failure to do so may result in the dismissal of this action for failure to  
8 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

9 10. Extensions of time must be filed no later than the deadline sought to be  
10 extended and must be accompanied by a showing of good cause.

11  
12 DATED: 8/12/2014

  
EDWARD J. DAVILA  
United States District Judge

UNITED STATES DISTRICT COURT  
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Case Number: CV14-02145 EJD

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/13/2014, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Enrique Diaz K-70268  
Salinas Valley State Prison  
A4-122  
P.O. Box 1050  
Soledad, CA 93960

Dated: 8/13/2014

Richard W. Wieking, Clerk  
/s/ By: Elizabeth Garcia, Deputy Clerk